RECORD AND BRIEFS

No. 15-1248

Supreme Court, U.S.
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In The

Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a district court's decision to quash or enforce an EEOC subpoena should be reviewed *de novo*, which only the Ninth Circuit does, or should be reviewed deferentially, which eight other circuits do, consistent with this Court's precedents concerning the choice of standards of review.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption of this petition contains all parties to the proceedings.

Petitioner McLane Company, Inc. (McLane) is a nonpublic, wholly owned subsidiary of Berkshire Hathaway Inc. Berkshire Hathaway Inc. is publicly traded on the New York Stock Exchange.

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OPINIONS BELOW

The order of the court of appeals denying *en banc* rehearing (Pet. App. 34) is unreported. The opinion of the court of appeals (Pet. App. 1-17) is reported at 804 F.3d 1051. The order of the district court (Pet. App. 18-34) is unreported but available at 2012 WL 5868959.

STATEMENT OF JURISDICTION

The court of appeals filed its order denying *en banc* rehearing on January 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the EEOC's investigative authority under 42 U.S.C. § 2000e-8(a):

> **Examination and copying of evidence related to unlawful employment practices**
>
> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

Section 2000e-9 of Title 42 of the United States Code adopts the procedures applicable to the National Labor Relations Board:

> **Conduct of hearings and investigations pursuant to section 161 of Title 29**
>
> For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

Section 161 of Title 29 authorizes the agency to issue subpoenas and seek enforcement in court:

> **Investigatory powers of Board**
>
> For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—
>
> **(1) Documentary evidence; summoning witnesses and taking testimony**
>
> The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production

of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) Court aid in compelling production of evidence and attendance of witnesses

In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring

> such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

STATEMENT

Decisions by district courts about whether to enforce administrative subpoenas require fact-intensive, case-specific determinations, which should receive deference on appeal. Following this Court's precedent, all circuits (save the Ninth) to have considered the issue have correctly held that these decisions are reviewed deferentially. And the government has now declined to defend the Ninth Circuit's *de novo* standard. See Letter from Ian Heath Gershengorn, Acting Solicitor General, U.S. Dep't of Justice, to Honorable Scott S. Harris, Clerk, Supreme Court of the United States (Nov. 2, 2016).

This case illustrates exactly why deferential review is appropriate. The district judge was intimately familiar with: (i) the facts alleged in the charge filed with the EEOC; (ii) a previous subpoena enforcement action in the same case; (iii) the parties' conduct through the litigation process; and (iv) the EEOC's evolving theories of purported relevance.

As other circuits have recognized, appellate courts working from a cold record are not as well situated as district courts to evaluate key issues related to enforcement decisions. These issues include determining whether: (i) an agency's stated rationale for subpoenaed information is pretextual or authentic; (ii) the subpoena is for an improper purpose; or (iii) the subpoena is unduly burdensome. In this case, the shifting bases for the EEOC's pursuit of the same information provided the district court with a potent clue that the information the EEOC seeks is not relevant to the filed charge it is now investigating.

The Ninth Circuit disregarded the district court's expertise and reviewed the fact-intensive relevance determination *de novo*, with no deference to the district court's analysis or its closer understanding of the case. And even if the Ninth Circuit were correct that the district court applied the incorrect legal standard, it should have remanded to the district court to exercise its discretion under the correct standard.

The judgment below should be reversed.

1. McLane is a leading supply-chain services company that buys, sells, and delivers consumer products to businesses across the United States, including convenience stores, drug stores, and mass merchandisers. JA 446, 449, 456.

Many of McLane's employees work in physically demanding positions. To ensure these employees have the physical capability needed to safely perform the essential functions of their positions, McLane requires

every employee newly hired for a physically demanding position and every employee returning to a physically demanding position from leave in excess of 30 days to take a physical capability evaluation. Pet. App. 3.

The evaluation—which tests, among other things, range of motion, resistance, and speed—is designed, administered, and validated by a third party, Industrial Physical Capability Services (IPCS). JA 365 & n.1. The evaluation is completely objective—it is an isokinetic evaluation measured by a machine. *Id.* at 365. McLane is not involved in any way in the administration or scoring of the evaluation. Nor does McLane determine the rating needed to successfully complete the evaluation. That is done by IPCS in conjunction with third-party ergonomic experts, General Management Solutions, Inc. *Id.* at 70 n.2, 71, 365 & n.2.

2. Damiana Ochoa worked for McLane Sunwest, McLane's Arizona distribution center, for more than eight years as a cigarette selector, JA 42, a physically demanding job that involves lifting, packing, and moving totes. After Ochoa took maternity leave from August until the end of October 2007, McLane informed her that she would have to meet the minimum requirements on the physical capability evaluation to return to work. *Ibid.* After Ochoa failed to demonstrate the minimum physical capability for her position three times—twice in November and once in December—she was terminated. *Ibid.*

3. Ochoa filed a charge of discrimination with the EEOC alleging a belief that she had been discriminated against in violation of Title VII of the Civil Rights Act because of her sex and pregnancy. JA 41-43. The charge alleges:

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (Physical Capability Strength Test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007 and December 28, 2007, I retested and did not pass. I have worked for the above-named employer for over 8 years as a cigarette Selector.
>
> I believe I have been discriminated against because of my sex, female (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The Physical Capability Strength Test is given to all employees returning to work from a medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

Id. at 42-43.

Neither Ochoa nor the EEOC has ever suggested that the policy is selectively enforced based on sex or pregnancy. On the contrary, the charge makes clear

that every employee returning from medical leave and every new hire takes the evaluation. *Id.* at 43. And although the charge references the ADA, Ochoa has never alleged that she was disabled. *Ibid.*

4. In 2009, the EEOC expanded the scope of its investigation far beyond Ochoa's individual sex-discrimination charge. JA 365-66. The EEOC sought nationwide information about all McLane facilities, business divisions, and related entities, even though Ochoa only worked for McLane's Arizona grocery-distribution center. *Id.* at 366, 380, 385. McLane gave the EEOC information consistent with the scope of the charge and objected to the requests for irrelevant matters. *Id.* at 366, 393-94; Pet. App. 21.

In response, the EEOC threatened to further expand its investigation into "nationwide compliance" with the Age Discrimination in Employment Act (ADEA) by McLane-related entities across the country. JA 367. The EEOC sought the personal information of every individual who had taken the evaluation nationwide for McLane—more than 14,000 people. Pet. App. 20; JA 233, 393-94.

The personal information sought by the EEOC included "pedigree information" such as each individual's name, sex, date of birth, Social Security number, and contact information. Pet. App. 20; JA 385-90. The EEOC also requested that McLane provide the reason each person took the evaluation, the score on the evaluation, and any adverse employment action taken based on evaluation performance. Pet. App. 20. Lacking an actual charge of age discrimination to justify

these expanded requests, the EEOC added an additional charge number—but no actual charging party—to its request for the pedigree information. JA 367, 369-70.

The EEOC did not point to any evidence that led to this expanded investigation, and no evidence of age-related discrimination had been provided to the EEOC. (Ochoa herself was under 40 years old at the time.) *Ibid.* The stated justification for the EEOC's request for pedigree information was that the EEOC was "looking for 'victims.'" *Id.* at 370.

5. McLane sought to cooperate with the EEOC and requested a meeting to work out a possible compromise. JA 370. Instead, the EEOC issued two virtually identical subpoenas. *Id.* at 371. One related to the Ochoa charge (the Ochoa Subpoena). *Id.* at 41-43, 92-94. The other related to the ADEA charge number that lacked any charging party (the ADEA Subpoena). *Id.* at 169-71, 371. Both subpoenas requested the same pedigree information for over 14,000 people. *Id.* at 233.

McLane responded by providing substantial information but without waiving its objections. *Id.* at 321-34. Although Ochoa only worked at McLane Sunwest, McLane produced information about all grocery applicants and employees who had taken the evaluation nationwide. For each person, McLane provided: (1) a unique identification number; (2) job location; (3) sex; (4) reason for taking the evaluation; (5) job sought; (6) physical capability achieved; and (7) whether that capability met the minimum requirement for the job sought. *Id.* at 310-11.

6. Despite McLane's extensive production, the EEOC sued to enforce the ADEA Subpoena. After briefing and a hearing on the EEOC's requests and McLane's objections, the district court enforced the ADEA subpoena in part, exercising its discretion to balance the EEOC's authority to investigate with the jurisdictional limit on that authority set by the scope of the charge. *EEOC* v. *McLane Co.*, No. CV-12-615-PHX-GMS, 2012 WL 1132758, at *5-7 (D. Ariz. Apr. 4, 2012). The district court concluded that the EEOC's stated scope of investigation—to determine whether the evaluation represents a tool of age discrimination in the aggregate—warranted nationwide statistical data. *Id.* at *5.

The district court upheld, however, McLane's objection to the EEOC's request for personal pedigree information for the approximately 14,000 people who have taken the evaluation. *Id.* at *7. The district court also determined that providing information about why any particular employee who took the evaluation was terminated created an undue burden. *Id.* at *6. The district court did order McLane to produce information about whether any person who took the evaluation suffered an adverse employment action within 90 days of taking the evaluation. *Ibid.* McLane complied and the EEOC abandoned the unfulfilled requests for information in the ADEA Subpoena. JA 232-33; Pet. App. 5 n.1.

7. The EEOC then sued a second time in the same district court to enforce the Ochoa Subpoena. Pet. App. 5. This time, the EEOC claimed that it needed the pedigree information to investigate ADA

violations (despite the fact that Ochoa is not disabled) by contacting each person who had taken the evaluation to see if they were disabled and if they would otherwise have been qualified to do the job they sought. JA 21-22, 466-71.

McLane again argued that the pedigree information sought was not relevant; that producing the pedigree information would impose an undue burden; and that analyzing thousands of files to produce the reasons for termination of anyone who had taken the evaluation was an undue burden. *Id.* at 211-27.

The district court enforced the Ochoa Subpoena to the same extent it enforced the ADEA Subpoena. Pet. App. 32-33. The court again compelled McLane to produce nationwide statistical data concerning every single evaluation participant, but declined to order McLane to provide nationwide pedigree information. *Id.* at 32.

The district court determined from "the EEOC's filings and the discussion at the hearing" that "the primary motivation for obtaining the pedigree information related to the ADA charge * * * [and was] not relevant * * * to a determination of whether the [evaluation] systematically discriminates on the basis of [sex]." *Id.* at 28-29. Restating its earlier ruling on the ADEA Subpoena, the district court held that the pedigree information "simply could not 'shed light on' whether the [evaluation] represents a tool of [sex] discrimination in the aggregate." *Id.* at 29.

Because the district court refused to enforce the subpoena of the pedigree information on relevance grounds, the court did not address McLane's arguments that producing pedigree information would impose an undue burden.

8. The EEOC appealed the district court's partial denial of the Ochoa Subpoena to the Ninth Circuit. Pet. App. 2. On appeal, the EEOC abandoned the ADA investigation and argued only that it needed the pedigree information to investigate whether individuals had been subject to sex discrimination. *Id.* at 5-6 n.1.

9. The Ninth Circuit reversed—candidly admitting that it was unclear why it applies a *de novo* standard of review to district-court determinations concerning administrative subpoenas while other circuits review those determinations for abuse of discretion. Pet. App. 8 n.1 (citing *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010); *EEOC* v. *United Air Lines, Inc.*, 287 F.3d 643, 649, 654 n.6 (7th Cir. 2002)). The Ninth Circuit recognized the inconsistency of applying *de novo* review when "[i]n a similar but related context—issuance of a protective order restricting the scope of an administrative subpoena—we have said that review is for abuse of discretion." *Ibid.*

Applying the *de novo* standard nonetheless, as Ninth Circuit precedent required it to do, the panel reached the opposite conclusion from the district court and compelled production of the pedigree information—holding that the information was relevant to the EEOC's investigation of Ochoa's charge. *Id.* at 10.

Without referencing the actual language of the charge or discussing the facts of the administration of the evaluation, the Ninth Circuit concluded that the charge could be interpreted as either a disparate impact or a disparate treatment claim—and in the Ninth Circuit's view, the pedigree information was relevant because it could assist the EEOC in investigating sex discrimination. *Id.* at 10-14.

After the Ninth Circuit denied a petition for rehearing *en banc*, *id.* at 34, this Court granted certiorari.

SUMMARY OF ARGUMENT

The panel was right to question why the Ninth Circuit stands alone in reviewing *de novo* the decisions of district courts regarding the enforcement of administrative subpoenas. Every other circuit that has addressed the issue has held that more deferential review is appropriate.[1] As those courts have recognized, that conclusion is virtually compelled by this

[1] See, e.g., *FTC* v. *Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015) (abuse of discretion); *EEOC* v. *Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 760 (11th Cir. 2014) (per curiam) (abuse of discretion); *EEOC* v. *Randstad*, 685 F.3d 433, 442 (4th Cir. 2012) (abuse of discretion); *Kronos*, 620 F.3d at 295 (abuse of discretion); *EEOC* v. *Technocrest Sys.*, 448 F.3d 1035, 1038 (8th Cir. 2006) (abuse of discretion); *NLRB* v. *Am. Med. Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006) (clear error); *EEOC* v. *Dillon Cos.*, 310 F.3d 1271, 1274 (10th Cir. 2002) (abuse of discretion); *United Air Lines*, 287 F.3d at 649 (abuse of discretion or clear error); *EEOC* v. *Roadway Express, Inc.*, 261 F.3d 634, 638 (6th Cir. 2001) (abuse of discretion); *EEOC* v. *Packard Elec. Div., Gen.*

Court's precedents, which require deference to district courts on discovery and subpoena issues as a quintessential exercise of district-court discretion. See, e.g., *Pierce* v. *Underwood*, 487 U.S. 552, 562 (1988) (observing that review for abuse of discretion is appropriate when a question "involve[s] multifarious, fleeting, special, narrow facts that utterly resist generalization" (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 662-63 (1971))). Indeed, the Acting Solicitor General recently notified the Court that the government would not defend the Ninth Circuit's use of the *de novo* standard. Letter, Nov. 2, 2016.

Deferential review in this area makes sense because trial courts can better assess parties' needs, the veracity of their explanations, the resources they have (or have not) expended, and a host of prudentially significant facts that inform judgments about subpoenas and discovery issues. See, e.g., *United States* v. *Nixon*, 418 U.S. 683, 702 (1974) ("Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues."). Even the Ninth Circuit has recognized as much in other contexts. See, e.g., *United States* v. *Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor Gen. of the Russian Fed'n*, 235 F.3d 1200, 1206 (9th Cir. 2000)

Motors Corp., 569 F.2d 315, 317-18 (5th Cir. 1978) (abuse of discretion). In this context, the "clear error" and "abuse of discretion" standards are functionally equivalent.

(applying abuse-of-discretion standard to foreign tribunal document requests under 28 U.S.C. § 1782 because "district courts are in the best position to review the details of the request and to determine whether judicial assistance is justified"). So have other courts. See, e.g., *Gile* v. *United Airlines, Inc.*, 95 F.3d 492, 495 (7th Cir. 1996) ("A district court is in the best position to decide the proper scope of discovery and to settle any discovery disputes.").

Institutional competence, in particular, cuts strongly in favor of deferential review of EEOC subpoenas—again, as every other court of appeals considering the issue has concluded. Questions of motive, relevance, and comparative burden are the stuff of which trial-court judgment is made. The Ninth Circuit panel here recognized as much by citing closely related circuit law: "In a similar but related context—issuance of a protective order restricting the scope of an agency subpoena * * * review is for abuse of discretion." Pet. App. 8 n.1 (citing *McLaughlin* v. *Serv. Emps. Union*, 880 F.2d 170, 174 (9th Cir. 1989)). That the Ninth Circuit reviews an order modifying an EEOC subpoena *de novo*, while reviewing an order entering a protective order relating to an EEOC subpoena for abuse of discretion, is a conundrum that only underscores the illogic of the Ninth Circuit's position.

The practical consequences of modifying or quashing a subpoena also militate in favor of an abuse-of-discretion standard. The EEOC has numerous alternative means to gather additional information if its subpoena fails—including filing a broader charge

of its own, through which it may subpoena more information. So the consequences to the EEOC of nonenforcement are correspondingly minor. See, e.g., *Harman* v. *Apfel*, 211 F.3d 1172, 1177 (9th Cir. 2000) (noting as to a determination whether a remand in a Social Security benefits case should be for further proceedings or for immediate payment of benefits that "[w]hile we do not minimize the impact of continued delay in the payment of deserved benefits, the potential for 'substantial consequences' here is not so paramount as to dictate the application of *de novo* review unless other factors also point in that direction" (quoting *Pierce*, 487 U.S. at 563)).

This case illustrates precisely why abuse of discretion is the correct standard of review. The district court examined the EEOC's requests and held multiple hearings on the subpoenas. In applying the law to the facts, the district judge was able to consider the language of the charge against the agency's evolving theories of relevance to obtain the pedigree information. The information sought by the EEOC is not relevant to the filed charge it is investigating and the district court could see that from more than just the language of the charge.

For all these reasons, the Court should hold that the Ninth Circuit erred in reviewing the order here *de novo*, and remand for the court of appeals to apply the correct legal standard in the first instance. Under the deferential standards applied by the other courts of appeals, the EEOC would have had to demonstrate that the district court abused its discretion (or clearly

erred) in finding that the subpoena—which it based on two previous, abandoned theories—sought information too attenuated from Ms. Ochoa's sex-discrimination claim to enforce. This the EEOC cannot do—as the panel perhaps implicitly acknowledged when it did not indicate (as it well could have) that it would have reached the same result under either standard. Cf. *Staehr* v. *Alm*, 269 F. App'x 888, 891 (11th Cir. 2008) (per curiam) (noting that "[a]ppellant loses under either mode of review"); *Scalisi* v. *Fund Asset Mgmt., L.P.*, 380 F.3d 133, 137 n.6 (2d Cir. 2004) (noting that "we would reach the same conclusion under either standard").

Although the government argued in opposing certiorari that the Ninth Circuit's judgment could be affirmed on the alternative basis that the district court itself applied the wrong legal standard in determining relevance (which it did not), the proper remedy would have been for the Ninth Circuit to remand for the district court to apply the proper standard in the first instance—not rendition by the court of appeals. See, e.g., *Toyo Tire Holdings of Ams. Inc.* v. *Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 983 (9th Cir. 2010). Subpoena enforcement determinations are properly vested with district courts, subject only to deferential appellate review. As a result, the judgment of the Ninth Circuit cannot stand.

ARGUMENT

I. As Every Circuit Except The Ninth Has Held, Courts Of Appeals Should Review Decisions To Enforce Or Quash Agency Subpoenas With Deference.

In deciding whether to enforce a subpoena issued by an agency, a district court must consider whether the subpoena overreaches the agency's authority; whether the subpoena seeks relevant information; whether the subpoena imposes an unreasonable burden; and whether the subpoena issued in bad faith. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *United States* v. *Powell*, 379 U.S. 48, 58 (1964). The issues before the district court "are neither minor nor ministerial matters." *Okla. Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 217 n.57 (1946).

The EEOC possesses narrower subpoena authority than other agencies: "[U]nlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only to evidence 'relevant to the charge under investigation.'" *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 64 (1984) (footnote omitted) (quoting 42 U.S.C. § 2000e-8(a)). Before enforcing a subpoena issued by the EEOC, "[t]he district court has a responsibility to satisfy itself that the charge is valid and that the material requested is 'relevant' to the charge * * * and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." *Id.* at 72 n.26.

As every circuit except the Ninth has held when considering the issue, a district court's decision about whether to enforce an administrative subpoena should be reviewed with deference. This conclusion follows inexorably from the text of the governing statute; this Court's precedent on standards of review; the district court's superior position to apply the fact-sensitive legal standard; the standard of review applicable to decisions regarding other subpoenas; and factors of judicial economy.

A. The Governing Statute Indicates That District Courts Have Discretion In Enforcing EEOC Subpoenas.

In *Pierce* v. *Underwood*, this Court identified "the language and structure of the governing statute" as the first factor to be considered in the standard-of-review analysis. 487 U.S. at 559. Here, Section 11 of the National Labor Relations Act, 29 U.S.C. § 161(1), controls the EEOC's subpoena authority. (Both the EEOC and the National Labor Relations Board issue subpoenas under the same statutory provision and regulations that are identical in all relevant respects. See 42 U.S.C. § 2000e-9.) The statute does not require a district court to enforce EEOC subpoenas, but merely provides the district court with jurisdiction to do so: a "district court * * * shall have jurisdiction to issue to such person an order requiring such person * * * to produce evidence." 29 U.S.C. § 161(2). Nothing in the statute requires the district court to exercise this jurisdiction in any particular manner, strongly suggesting

that the district court possesses its usual discretion regarding the enforcement of administrative subpoenas. See *Goodyear Tire & Rubber Co.* v. *NLRB*, 122 F.2d 450, 453 (6th Cir. 1941).

In *Goodyear*, the Sixth Circuit held that because "the statute does not require the District Court to issue the order, but simply gives it jurisdiction to issue," enforcement of an NLRB subpoena is "confided to the discretion of the District Court, which is to be judicially exercised." *Ibid.* The Sixth Circuit thus concluded that its review "extends no further than the determination as to whether or not there was an abuse of its discretion." *Ibid.*; see also *NLRB* v. *Friedman*, 352 F.2d 545, 547 (3d Cir. 1965) (relying on *Goodyear* for the abuse-of-discretion standard of review); *NLRB* v. *Consol. Vacuum Corp.*, 395 F.2d 416, 419-20 (2d Cir. 1968) (citing *Friedman* for the standard of review); *NLRB* v. *G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982) (per curiam) (same). A later decision from the Sixth Circuit reiterated that under the statutory text, "[m]anifestly, the district court ordinarily will have discretion to determine whether it will issue such an order." *NLRB* v. *Detroit Newspapers*, 185 F.3d 602, 605 (6th Cir. 1999).

Courts in EEOC subpoena cases have, in turn, relied upon this line of cases to hold that the standard of review should be abuse of discretion. See, e.g., *Roadway Express*, 261 F.3d at 638 (citing *Detroit Newspapers* for the standard of review); *Technocrest*, 448 F.3d at 1038 (citing *Roadway Express* for the standard of review). The statutory language thus provides a

solid basis for the courts of appeals' holding that the exercise of discretion by district courts in determining whether to enforce EEOC subpoenas should be reviewed for abuse of that discretion.

B. This Court's Precedent Dictates That Review Should Be For Abuse Of Discretion.

This Court's precedent governing standards of review compels the conclusion that review should be for abuse of discretion. Where, as here, a district court is better positioned than a court of appeals to decide an issue, district courts need flexibility to decide that issue.

The seminal case on the appropriate standard of review is *Pierce*, which concerned review of a fee award under the Equal Access to Justice Act. 487 U.S. at 555. Under *Pierce*, the standard-of-review inquiry includes factors such as "the language and structure of the governing statute," *id.* at 559; "[t]he non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop," *id.* at 562 (quoting Rosenberg, *supra*, at 663); whether a decision "ordinarily has * * * substantial consequences" requiring "it to be reviewed more intensively," *id.* at 563; and whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question," *id.* at 559-60 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114

(1985)). Here, all relevant factors cut in favor of review for abuse of discretion.[2]

Most important, as in *Pierce*, district courts are better positioned than courts of appeals to decide issues related to enforcement of administrative subpoenas. For example, whether a subpoena seeks relevant information and whether the information is within the scope of the agency's authority "will turn upon not merely what was the law, but what was the evidence regarding the facts." *Pierce*, 487 U.S. at 560. And whether an agency issued a subpoena in bad faith or for an improper purpose is a factual inquiry. "By reason of settlement conferences and other pretrial activities," in making these determinations "the district court may have insights not conveyed by the record" that bear on "matters [such] as whether particular evidence was worthy of being relied upon." *Ibid.*

The courts of appeals are far less equipped to resolve these issues on a cold appellate record, and "[e]ven where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense." *Ibid.* Unlike district courts, appellate courts do not

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[2] Because the statute in *Pierce* provided no guidance on the standard of review, the Court focused on whether "one judicial actor is better positioned than another to decide the issue in question." 487 U.S. at 559-60 (quoting *Miller*, 474 U.S. at 114); see also *Koon* v. *United States*, 518 U.S. 81, 98 (1996) (relying on district courts' "institutional advantage over appellate courts in making these sorts of determinations" in adopting an abuse-of-discretion standard of review).

have the benefit of interacting with the parties and their counsel over time. Unlike district courts, appellate courts do not hear live testimony to assess credibility. And unlike district courts, appellate courts do not have a continuing relationship with the subject matter of the litigation, which gives them more context to evaluate discovery and subpoena disputes.

Further, this Court noted in *Pierce* that only deferential review gives the district court the necessary flexibility to resolve questions involving "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Id.* at 561-62 (quoting Rosenberg, *supra*, at 662). Discretionary review of a district court's decision is thus appropriate when "the number of possible situations is large," and this Court is "reluctant either to fix or sanction narrow guidelines for the district courts to follow." *Id.* at 562 (quoting *Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 10-11 (1980)).

The same is true here. Whether a subpoena should be enforced turns on special, narrow facts about the particular request and the particular facts of the investigation. For an EEOC subpoena, the decision also depends on the specific allegations of the charge. Given the wide variety in facts, decisions are "little susceptible * * * of useful generalization." *Ibid.* Like the issuance of Rule 11 sanctions, enforcement of an administrative subpoena requires "fact-intensive, close calls." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (citation omitted); see also *id.* at 402 ("Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal

the pertinent facts and apply the fact-dependent legal standard* * * *"). Reviewing the decision to enforce or quash an administrative subpoena under a deferential standard will provide a district court with the "needed flexibility" to resolve each case on its unique facts. *Pierce*, 487 U.S. at 562.

Moreover, the practical consequences of modifying or quashing a subpoena also militate in favor of an abuse-of-discretion standard. See *id.* at 553. If an EEOC subpoena is not enforced, the agency has numerous alternative means to gather additional information. It can, for example, file a broader charge of its own (through which it may subpoena more information). So the consequences of non-enforcement are correspondingly minor and therefore warrant less "intensive" appellate review. Indeed, the district court here noted that the agency's request for pedigree information was not foreclosed permanently—just on the facts as they existed at that time. Pet. App. 30.

In adopting an abuse-of-discretion standard of review, the courts of appeals have properly followed this Court's precedent—most notably *Pierce*—in recognizing the fact-bound, flexible nature of the decision. For example, the Fifth Circuit has explained that "the district court may weigh such equitable criteria as reasonableness and oppressiveness in issuing a subpoena for documents." *Packard Electric*, 569 F.2d at 318. These factors suggest that a court must undertake "a balancing of hardships and benefits, and the standard

by which we review such matters of relative burdensomeness is 'abuse of discretion.'" *Ibid.*

The D.C. Circuit has recognized that questions of relevance in administrative subpoenas are "essentially factual in nature." *FTC* v. *Lonning*, 539 F.2d 202, 210 n.14 (D.C. Cir. 1976). And the Tenth Circuit has noted that "elemental principles" dictate that "whether a subpoena duces tecum should be enforced is in the first instance a question for the trial court, and its decision should not be disturbed on appeal unless it clearly appears it is arbitrary and finds no support in the record." *Shotkin* v. *Nelson*, 146 F.2d 402, 404 (10th Cir. 1944).[3]

Precedent thus confirms what the statutory text makes plain—decisions regarding enforcement of EEOC subpoenas should be reviewed for abuse of discretion, and not, as the Ninth Circuit does, *de novo*.[4]

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[3] The proposition that district-court determinations to enforce or quash EEOC subpoenas should be reviewed for abuse of discretion follows so inexorably from the "elemental principles" embodied in this Court's precedents that most courts of appeals' opinions have not required extensive analysis to reach that conclusion. See, e.g., *Royal Caribbean*, 771 F.3d at 760; *Kronos*, 620 F.3d at 295; *Technocrest*, 448 F.3d at 1038; *United Air Lines*, 287 F.3d at 649; *Roadway Express*, 261 F.3d at 638.

[4] The case often cited as the source of the Ninth Circuit's rule, *EPA* v. *Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 445-46 (9th Cir. 1988), relied on a false dichotomy between review for clear error and review *de novo* created in *United States* v. *McConney*, 728 F.2d 1195, 1200-01 (9th Cir. 1984) (en banc). Notably, *McConney* predated the explication of the abuse-of-discretion standard in *Pierce* and its progeny.

C. Reviewing EEOC Subpoena Determinations For Abuse Of Discretion Is Consistent With Review Of Similar Decisions.

Applying an abuse-of-discretion standard to review enforcement of administrative subpoenas is not only consistent with this Court's precedent, but also with the standards of review applied in similar contexts. This Court has described an agency's investigative function as "essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence." *Powell*, 379 U.S. at 57 (quoting *Walling*, 327 U.S. at 216); see also *Morton Salt Co.*, 338 U.S. at 642 (explaining that the inquisitorial power of an agency "is more analogous to the Grand Jury").

In both contexts, it is well established that a district court's decision is reviewed for abuse of discretion. See *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 102 (2d Cir. 2008) ("We review discovery rulings for abuse of discretion.").[5] Even the Ninth Circuit has acknowledged that district court decisions regarding grand jury subpoenas must be reviewed with deference: "We review denial of a motion to quash a Grand Jury subpoena for abuse of discretion." *United States* v. *Chen*, 99 F.3d 1495, 1499 (9th Cir. 1996). So have

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[5] See also *Theriot* v. *Par. of Jefferson*, 185 F.3d 477, 491 (5th Cir. 1999) ("We review a district court's decision denying discovery, including quashing deposition subpoenas, for abuse of discretion."); *Linder* v. *Dep't of Def.*, 133 F.3d 17, 24 (D.C. Cir. 1998) ("Because the district court enjoys wide latitude in resolving discovery issues, we review its determination of the scope of the subpoenas for abuse of discretion.").

other courts, including this Court. *Nixon*, 418 U.S. at 702 ("Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues.").[6]

The courts of appeals have relied on the standard of review applied to subpoenas generally in holding that review of administrative subpoenas should be for abuse of discretion. For example, the Tenth Circuit relied on general principles in considering the standard of review for a district court decision enforcing an administrative subpoena issued by the War Powers Board:

> Whether a subpoena duces tecum should be enforced is in the first instance a question for the trial court, and its decision should not be disturbed on appeal unless it clearly appears it is arbitrary and finds no support in the record. We deem it unnecessary to cite an array of authorities in support of these elemental principles.

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[6] See also *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001) ("We review the decision to quash a grand jury subpoena for abuse of discretion."); *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requenaharman*, 913 F.2d 1118, 1122 (5th Cir. 1990) ("A district court's order quashing a grand jury subpoena can only be overturned for an abuse of discretion."); *In re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir. 1984) ("We review a district court decision to quash, or not quash, a grand jury subpoena, solely for abuse of discretion, with much deference being owed to the lower court's authority.").

Shotkin, 146 F.2d at 404. In reviewing a district-court decision regarding an EEOC subpoena, the Eighth Circuit has noted that the general standard of review applicable to subpoenas under Rule 45 is abuse of discretion. *Technocrest*, 448 F.3d at 1038 (citing *Pointer* v. *DART*, 417 F.3d 819, 821 (8th Cir. 2005)). Similarly, the D.C. Circuit, in reviewing a decision regarding enforcement of a subpoena issued by the Federal Trade Commission, relied on the abuse-of-discretion standard of review applicable to decisions to enforce grand jury subpoenas. See *FTC* v. *GlaxoSmithKline*, 294 F.3d 141, 146 (D.C. Cir. 2002) (quoting *In re Sealed Case*, 146 F.3d 881, 883 (D.C. Cir. 1998)).

Reviewing enforcement of administrative subpoenas for abuse of discretion is thus entirely consistent not only with text and precedent, but also with the review of similar trial-court determinations.

D. Judicial Economy And Other Factors Confirm That Review For Abuse Of Discretion Is Appropriate.

Other factors also confirm that deferential review is appropriate. In particular, judicial economy counsels strongly in favor of deference to the trial court. *De novo* review, by providing a greater likelihood of appellate success, necessarily fosters appeals—thereby increasing the costs and delay of litigation. "[D]eference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from

pursuing marginal appeals, thus reducing the amount of satellite litigation." *Cooter & Gell*, 496 U.S. at 404. Such delay injures plaintiffs waiting for their charges to be resolved.

The disparity in resources between the parties only exacerbates the need for deferential review. An agency, which controls the scope of the subpoena, can appeal any unfavorable district-court decision with the virtually unlimited resources of the federal government. Private litigants, in contrast, must weigh the benefits of resisting an overbroad administrative subpoena against the costs of counsel. A *de novo* standard of review would require the private litigant to litigate the same issue twice, both before the district court and again on appeal.

In sum, as the text of the governing statute suggests, the precedent of this Court dictates, and analogous contexts confirm, decisions regarding enforcement of administrative subpoenas should be reviewed for abuse of discretion. District courts are simply better positioned to decide these questions, consistent with review of enforcement of other subpoenas. Accordingly, the Ninth Circuit should be reversed and the case remanded for application of the proper legal standard in the first instance.

II. The Ninth Circuit's Judgment Cannot Be Affirmed On Any Alternative Ground.

In its brief in opposition to the petition, the government argued that the judgment below should be affirmed even under an abuse-of-discretion standard because the district court committed an error of law that amounts to an abuse of discretion. Opp. at 12 ("A district court by definition abuses its discretion when it makes an error of law." (internal quotation marks and citation omitted)). But the court of appeals, like this Court, is a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Thus even if the district court applied the wrong legal standard (which it did not, as demonstrated below), the proper remedy would have been for the Ninth Circuit to remand for the district court to apply the correct standard. See, e.g., *Toyo Tire*, 609 F.3d at 983 ("[W]e reverse and remand for the district court to properly weigh the appropriate factors.").

Because the parties did not brief below whether the district court abused its discretion (given controlling Ninth Circuit precedent), and because the panel reviewed the district court *de novo*, not for abuse of discretion, this Court should follow its usual course and remand for the Ninth Circuit to apply the abuse-of-discretion standard in the first instance. See, e.g., *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1653-54 (2016) (declining to address arguments not considered by the court of appeals and remanding).

Regardless, the judgment cannot be affirmed on any alternative basis because (i) the district court did not apply an incorrect legal standard, and (ii) the district court did not abuse its discretion. In light of its experience with the parties' litigating positions and the history of the case, the district court properly compared the information sought by the EEOC to the allegations in correctly concluding that the pedigree information was not relevant to the EEOC's investigation. The Ninth Circuit panel simply misread the district court's opinion in concluding that it applied an incorrect standard of relevance.

A. The District Court Did Not Apply An Incorrect Legal Standard.

This Court has cautioned that courts of appeals should be hesitant to infer that a district court has applied a wrong legal standard in making a discretionary decision: "An appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading, particularly when the applicable standard of review is deferential." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008). The Ninth Circuit failed to heed this admonition.

When conducting its relevance analysis, the district court recognized that the EEOC's primary motive in acquiring the pedigree information "related to the ADA charge," not the sex-discrimination charge. Pet. App. 28. The district court noted the possibility that

the EEOC was "trolling for possible complainants" rather than investigating Ochoa's charge. *Id.* at 29. And the district court noted that the EEOC already had all of the information that would cast light on the gender discrimination alleged by Ochoa. *Ibid.*

After conducting this analysis, the district court noted, in a single sentence, that the information may become relevant in the future: "At that point, pedigree information may become relevant to an investigation and the EEOC may find it necessary to seek such information." *Id.* at 30.

Based on this sentence, the Ninth Circuit suggested that the district court thought the evidence was relevant only if it was "necessary" to the EEOC's investigation. *Id.* at 12 ("As we have explained, however, that line of reasoning is invalid: The EEOC's need for the evidence—or lack thereof—simply does not factor into the relevance determination.").

The Ninth Circuit misread the district court's opinion. The district court did not state that evidence was "relevant" only if it was "necessary" to the EEOC. To the contrary, the district court referred only to whether the EEOC would "find it necessary to seek" the pedigree information through another subpoena. As an English idiom, to "find it necessary" to take an action refers to an actor choosing or deciding to take the action.[7] The district court did not, by recognizing

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[7] Cf. *McCulloch* v. *Maryland*, 17 U.S. 316, 413 (1819) ("If reference be had to its use, in the common affairs of the world, or in approved authors, we find that [the word 'necessary'] frequently

that the EEOC might "find it necessary" to seek information in the future, equate "relevance" and "necessity."

Particularly in light of *Sprint*'s admonition that a court of appeals should interpret a district court's opinion charitably, the Ninth Circuit erred in concluding that the district court applied the wrong legal standard. Even if the Ninth Circuit were concerned that the sentence indicated that the district court might have applied the wrong standard, the appropriate remedy was to remand for clarification, not to reverse (much less to render). *Sprint*, 552 U.S. at 386.

Moreover, the legal standard that the Ninth Circuit thought the district court applied—considering the necessity of the subpoenaed information to the investigation as a factor in its relevance—would not have been erroneous. The panel's sole support was *EEOC* v. *University of Pennsylvania*, 493 U.S. 182 (1990). Pet. App. 11 (citing 493 U.S. at 188). But that case dealt with the scope of a peer review privilege, not the EEOC's subpoena power. 493 U.S. at 188. Indeed, the University conceded there that the information sought passed "the relevance test" that limits the EEOC's subpoena power. See *id.* at 191-92. Neither the EEOC nor the Ninth Circuit has cited any authority that supports the proposition that an agency's need for information is irrelevant to its subpoena power.

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imports no more than that one thing is convenient, or useful, or essential to another.").

Logically, whether information is "necessary" to cast light on the charge is quite significant to the relevance of that information. The courts of appeals have recognized as much: "The EEOC failed to present a cogent argument as to how the additional information sought, which pertains to employees and applicants from around the world suffering from any medical condition, in the light of the information the EEOC already possesses, would further aid the Commission in resolving the issues in dispute regarding Mr. Morabito's charge." *Royal Caribbean*, 771 F.3d at 762; see also *Lonning*, 539 F.2d at 210 n.14 (referring to whether documents "are relevant and necessary to an inquiry by the FTC"). Common sense confirms that the government should not be able to subpoena information for which it has no need because the information will cast no additional light on the investigation.

B. Even If The District Court Applied An Incorrect Legal Standard, The Proper Remedy Was To Remand, Not Render Judgment.

Even if the district court abused its discretion by applying an incorrect legal test for relevance, the judgment below cannot be affirmed. When a district court's exercise of discretion is influenced by legal error, a court of appeals should correct the legal error and remand for exercise of discretion under the correct standard. See, e.g., *Toyo Tire*, 609 F.3d at 983.

For example, in *FTC* v. *Boehringer Ingelheim Pharmaceuticals*, the D.C. Circuit stated that it reviews "a district court's decision to enforce an administrative subpoena for abuse of discretion," and that a "district court necessarily abuses its discretion if it applies the incorrect legal standard, a question that is reviewed *de novo*." 778 F.3d at 148. After determining that the district court applied the incorrect legal standard, the D.C. Circuit correctly remanded the case for the district court to exercise its discretion under the correct legal standard. *Id.* at 158.

This Court addressed this principle in the context of whether evidence is relevant at trial in *Sprint*. After concluding that the district court applied the incorrect standard for relevance, the Tenth Circuit "determined that the evidence was relevant and not unduly prejudicial, and reversed and remanded for a new trial." *Sprint*, 552 U.S. at 383. This Court explained that even if the court of appeals were correct that the district court applied the wrong standard, it erred by performing the balancing test itself: "Rather than assess the relevance of the evidence itself and conduct its own balancing of its probative value and potential prejudicial effect, the Court of Appeals should have allowed the District Court to make these determinations in the first instance, explicitly and on the record." *Id.* at 387; see also *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291 (1982) (noting that when a district court "fail[s] to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the

missing findings"). The same rule should apply to district-court determinations of relevance in the administrative subpoena context.

Moreover, even if the district court erred in analyzing relevance, the district court's consideration whether to enforce the subpoena was not complete. Before the district court, McLane explained that providing the pedigree information (for more than 14,000 individuals) would impose an undue burden because it did not possess the requested information in a readily accessible format (and much of the information McLane does not possess at all). JA 216-26. Because the district court refused to enforce the subpoena of the pedigree information on relevance grounds, it never reached McLane's burden argument.

Like relevance, the determination of burden required factual findings by the district court in the first instance. See *United Air Lines*, 287 F.3d at 653 ("What is unduly burdensome depends on the particular facts of each case and no hard and fast rule can be applied to resolve the question." (quoting *FTC* v. *Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980))); *Dow Chem. Co.* v. *Allen*, 672 F.2d 1262, 1267 (7th Cir. 1982) ("Similarly, court assessments of whether disclosure would be burdensome and of what restrictions might be appropriate are decisions within the sound discretion of the trial court and should only be reversed for abuse of discretion* * * *"). Because the district court made no finding as to undue burden, McLane could not have asserted it as an alternative ground for affirmance. See *Am. Fed. Grp., Ltd.* v. *Rothenberg*, 136 F.3d 897, 912 (2d

Cir. 1998) ("[T]o justify even partial affirmance on this alternative basis would require an improper incursion by this court into first-instance fact-finding."); see also *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (explaining impropriety of appellate court intrusions into fact-finding function of district courts).

Thus, even if the government were correct that the district court applied an incorrect legal standard in reviewing the enforceability of a subpoena, the judgment of the Ninth Circuit must be reversed and the case remanded to the district court for exercise of its discretion under a correct standard. At a minimum, the Ninth Circuit should have remanded to the district to consider McLane's other arguments against enforcement of the subpoena, including the undue burden of producing the pedigree information.

C. Like The Ultimate Decision Whether To Enforce A Subpoena, Relevance Should Be Reviewed For Abuse Of Discretion.

The government's brief in opposition suggests that even if a district court's ultimate decision to enforce an administrative subpoena should be reviewed for abuse of discretion, *de novo* review should apply to legal determinations that are part of the analysis. Opp. at 12.

This Court rejected precisely this approach to the standard of review in *Koon* v. *United States*.[8] It is true

[8] After *Koon*, Congress enacted the PROTECT Act, which requires *de novo* review of the "district court's application of the

that "[a] district court by definition abuses its discretion when it makes an error of law." 518 U.S. at 100. "[A]n abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Ibid.* But this proposition "does not mean, as a consequence, that parts of the review must be labeled *de novo* while other parts are labeled an abuse of discretion." *Ibid.* Instead, the court of appeals should simply review for abuse of discretion, while recognizing that "[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Ibid.*

Similarly, in *Cooter & Gell*, this Court rejected the Ninth Circuit's "three-tiered" approach to review of Rule 11 sanctions: "That Circuit reviews findings of historical fact under the clearly erroneous standard, the determination that counsel violated Rule 11 under a *de novo* standard, and the choice of sanction under an abuse-of-discretion standard." 496 U.S. at 399. Rather than adopting the Ninth Circuit's approach of parsing a discretionary decision out into separate pieces, this Court adopted "a unitary abuse-of-discretion standard [for] all aspects of a Rule 11 proceeding." *Id.* at 403. These decisions should guide the analysis here.

Relevance, like the overall decision whether to enforce an administrative subpoena, should thus be reviewed for abuse of discretion. There is good reason.

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guidelines to the facts." 18 U.S.C. § 3742(e). Where, as here, Congress has not spoken, *Koon*'s analysis remains instructive.

Like the overall decision, relevance turns on "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Id.* at 404 (quoting *Pierce*, 487 U.S. at 561-62). Although "relevance" for purposes of an EEOC subpoena is easier to satisfy than "relevance" for introduction of evidence at trial, the inquiries are similar.[9] And relevance has long been recognized as an issue uniquely within the trial court's discretion. McCormick explains that because of the variety of case-specific factors—including "[evidence's] relationship to the other evidence in the case, the importance of the issues on which it bears, and the likely efficacy of cautionary instructions to the jury"—"much leeway is given trial judges." 1 MCCORMICK ON EVID. § 185 (7th ed. 2016) (footnotes omitted). Wigmore notes that "there can be no inflexible test of admissibility, in practical logic for judicial trials." 1 WIGMORE ON EVID. § 212 (3d ed. 1942) (footnotes omitted).

Although a district court must apply law in determining whether information is relevant, a mixed question of law and fact that turns heavily on case-specific facts should be reviewed with deference: "The nontechnical nature of the statutory standard, the close

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[9] The EEOC may discover only "material that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68-69. In this context, "might" requires "a realistic expectation rather than an idle hope that something may be discovered." *United Air Lines*, 287 F.3d at 653 (citation omitted). The difference between a "realistic expectation" and an "idle hope" necessarily requires a case-specific, fact-intensive inquiry that depends on the language of the charge, the information requested, and the full context of the case.

relationship of it to the date of practical human experience, and the multiplicity of relevant factual elements" confirm "that primary weight in this area must be given to the conclusions of the trier of fact." *Comm'r* v. *Duberstein*, 363 U.S. 278, 289 (1960).

And because of the fact-dependent nature of the ruling, *de novo* review of relevance determinations would not create clarity in the law. "[D]eferential review of mixed questions of law and fact is warranted when it appears * * * that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 233 (1991); see also *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748-49 (2014) (holding that because relevance is "not susceptible to 'useful generalization' of the sort that *de novo* review provides * * * an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's [relevance] determination" (quoting *Pierce*, 487 U.S. at 562)). A ruling about the relevance of specific information in one investigation of specific charge language will have little value in determining the relevance of different information to a different charge.

The majority of courts of appeals have correctly recognized that questions of relevance of administrative subpoenas are "essentially factual in nature." *Lonning*, 539 F.2d at 210 n.14; see also *FTC* v. *Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) (same); *In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995) ("[I]f the district court concludes that the information sought by

the agency is relevant, we will affirm unless that determination is clearly erroneous."); *Hintze* v. *IRS*, 879 F.2d 121, 125 (4th Cir. 1989) (describing "whether the IRS issued the challenged summonses for legitimate purposes" as a "fact-specific question" reviewed for clear error), overruled on other grounds by *Church of Scientology* v. *United States*, 506 U.S. 9, 15 & n.8 (1992); *Dow Chemical*, 672 F.2d at 1267 ("A finding by the district court that documents are reasonably relevant to a legitimate agency purpose cannot be overturned absent a showing that the factual determinations on which it is based are clearly erroneous * * * *").[10]

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[10] Because a court abuses its discretion when it makes a clearly erroneous finding of fact, see, e.g., *United States* v. *4.85 Acres of Land, More or Less, Situated in Lincoln Cty.*, 546 F.3d 613, 617 (9th Cir. 2008), a clear-error standard is not incompatible with abuse-of-discretion review. To the extent there is a modest difference between the two standards, abuse of discretion would be the appropriate standard for at least three reasons (although the Court need not reach this issue to dispose of this case). First, review for clear error involves splitting the district court's decision into multiple pieces—*de novo* review for legal determinations and clear-error review for factual determinations. This Court rejected that move in *Koon*. 518 U.S. at 100; see also *Cooter & Gell*, 496 U.S. at 399 (selecting "a unitary abuse-of-discretion standard" over a "three-tiered" approach). Second, relevance determinations apply the law to facts in a necessarily mixed question that does not lend itself to a facts-only review for clear error. Third, as discussed above (at 19-21), the statutory language strongly suggests that the district court possesses its usual discretion regarding the enforcement of administrative subpoenas generally.

D. The District Court Did Not Abuse Its Discretion In Finding That The Information Was Not Relevant.

In this case, based on its knowledge of the facts, the allegations in the charge, and the EEOC's previous arguments, the district court concluded that the EEOC had no realistic expectation that interviewing various McLane employees might cast light on Ms. Ochoa's charge against McLane. Pet. App. 28-30. Its demand for information and request to interview these individuals represented, at best, "an idle hope" that it might uncover information (or uncover "victims"). The district court correctly found the requested information to be irrelevant.

If the EEOC could receive "pedigree" information in this case to interview other employees and ask about discrimination, there is no reason that it could not receive identical information in every other investigation. The EEOC would merely need to recite the boilerplate justification that it "wants to contact other * * * employees and applicants for employment * * * to learn more about their experiences." *Id.* at 10. This would, in essence, resurrect the "unconstrained investigative authority" rejected by this Court. *Shell Oil*, 466 U.S. at 65.

Moreover, based on its familiarity with the history of the litigation (including the EEOC's shifting positions), the district court recognized that the EEOC's primary motive in seeking the pedigree information was not to investigate the sex-discrimination charge:

"Judging by the E.E.O.C.'s filings and the discussion at the hearing, the primary motivation for obtaining the pedigree information related to the ADA charge." Pet. App. 28. The district court's conclusion about the EEOC's improper motive—based on its credibility determinations and its familiarity with the EEOC's evolving litigation positions—is entitled to deference.

Indeed, the Ninth Circuit's theory of relevance is inconsistent with the facts of this case and the sex-discrimination charge that the EEOC is investigating. Ms. Ochoa's charge alleged that because she was terminated for failing the physical capacity evaluation, she was "discriminated against because of [her] sex, female (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended." JA 42-43.

Although the panel was correct that a charge need not "allege discrimination based on any particular legal theory," Pet. App. 11, the EEOC's investigation must still be limited to the factual allegations in the charge.

One possible legal theory is disparate impact: the theory that the physical capacity evaluation "ha[s] a 'disproportionately adverse effect on [women]' and [is] otherwise unjustified by a legitimate rationale." *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015) (quoting *Ricci* v. *DeStefano*, 557 U.S. 557, 577 (2009)). As the district court correctly recognized, McLane provided all information that might cast light on a disparate impact theory. The "pedigree information" requested by the

EEOC was irrelevant to whether the neutral test had a disproportionately adverse effect on women and whether it was justified by a legitimate rationale.

The Ninth Circuit appeared to recognize this fact, suggesting instead that speaking with other employees (some of the approximately 14,000 individuals) might reveal "disparate treatment" of men and women. To the extent that the Ninth Circuit believed that "learn[ing] more about [other individuals'] experiences" with the test would be relevant to Ochoa's allegations against McLane, the Ninth Circuit misunderstood the facts. Pet. App. 10. The test—which is entirely objective and measured by a machine—is administered and scored by a third party, Industrial Physical Capability Services (IPCS). JA 365 & n.1. Investigating whether the test is administered or scored in a discriminatory fashion would require a charge of discrimination against IPCS, not against McLane.

This leaves a theory of nationwide pattern or practice of disparate treatment of men and women with the same evaluation results. But this theory is utter speculation. Ms. Ochoa certainly never alleged the existence of any such policy.

Indeed, such a discriminatory policy would seem to be inconsistent with Ms. Ochoa's allegation that the evaluation is applied indiscriminately: "The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position." *Id.* at 43.

Even if Ms. Ochoa's supervisor had a policy of firing women—but not men—who failed the physical capacity evaluation (an allegation absent from the charge), there is no reason to believe that any other supervisors would engage in the same disparate treatment. See, e.g., *Wal-Mart* v. *Dukes*, 564 U.S. 338, 350 (2011) ("[T]he mere claim by employees of the same company that they have suffered a Title VII injury * * * gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor."). Without more in the charge against the employer, the possibility of a single instance of disparate treatment does not justify a nationwide investigation into a company's practices, much less requiring the contact information for more than 14,000 individuals. Such a claim applies only to the employer location where the charge is made, further showing the disconnect between the charge and the EEOC's request.

The EEOC has no more than an idle hope that speaking with these various employees across the country will reveal information that casts light on Ms. Ochoa's charge. The scope of the EEOC's investigatory powers is limited to "evidence 'relevant' to the charge under investigation," evidence that might "cast light on the allegations against the employer" in the charge. *Shell Oil*, 466 U.S. at 68-69. The investigation that the EEOC sought to undertake in this case was untethered to the language of Ochoa's charge and represents precisely the "unconstrained investigative authority" that

Congress sought to prevent the EEOC from exercising. *Id.* at 65.

This is not the first time an agency has sought to subpoena nationwide employment data unrelated to its investigation. In *Goodyear*, the NLRB charged a company with, *inter alia*, discriminating against employees because of their union membership or activities. 122 F.2d at 451-52. Not only did the NLRB seek subpoena records related to the 158 departments where this discrimination allegedly occurred, but it sought "a card index of all active and inactive employees showing the name, department and clock-card number." *Id.* at 452. The Sixth Circuit concluded that the subpoena of all employee data "does not call for 'evidence that relates to any matter under investigation or in question.'" *Id.* at 453 (quoting 29 U.S.C. § 161). "The Board virtually concedes this when it asks for these cards not as evidence, but in order to facilitate the examination of other data." *Ibid.*

As in this case, the agency claimed that the full set of employment information "b[ore] upon the alleged discriminatory discharges, layoffs or demotions of the 93 employees named in the complaint." *Ibid.* The Sixth Circuit readily rejected this argument: "The matter in question is not the entire scope of the company's labor relationships." *Ibid.* "Obviously the request for the card index, said to be of 600,000 employees, necessarily contains a vast amount of irrelevant material." *Ibid.* Indeed, the Sixth Circuit concluded that the district court "exceeded the fair limits of judicial

discretion" in enforcing this portion of the subpoena. *Id.* at 454.

The same is true in this case. The matter under investigation is Ochoa's charge, not the entire scope of McLane's relationships with its employees. There is no reason to believe that the vast amount of pedigree information sought by the EEOC would cast light on Ochoa's allegation against McLane.

The district court understood the charge, the facts of the case, and the EEOC's shifting litigation positions far better than the Ninth Circuit understood them on a cold record. The district court did not abuse its discretion in concluding that the information sought by the EEOC was not relevant to its investigation of Ochoa's charge.[11]

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[11] To the extent the EEOC had information indicating that McLane had engaged in a pattern or practice of disparate treatment, the EEOC was and is able to bring a Commissioner's charge of systemic discrimination against McLane, which would permit this broader investigation into nationwide disparate treatment. 42 U.S.C. § 2000e-5(b). Filing such a charge would merely require a Commissioner to charge "in writing under oath or affirmation" that McLane "has engaged in [such an] unlawful employment practice." *Ibid.*

The EEOC's unwillingness (or inability) to take the relatively *de minimis* step of filing a Commissioner's charge alleging nationwide disparate treatment is telling.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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